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NO. 98-1255

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

UNITED STATES OF AMERICA,

Petitioner,

v.

ABEL MARTINEZ-SALAZAR

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

I.

Did the district court's concededly erroneous denial of a for-cause challenge to a juror on voir dire, requiring the defendant to exercise a peremptory challenge to remove a biased juror, require reversal where the defendant subsequently exhausted all peremptory challenges and there was unequivocal evidence in the record that the defendant would have used the peremptory challenge on a different juror?

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-14a) is reported at United States v. Martinez-Salazar146 F.3d 653 (9th Cir. 1998).

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1998. A petition for rehearing was denied on October 7, 1998. Pet. App. 20a-21a. Justice O'Connor extended the time within which to file a petition for certiorari to and including February 4, 1999. The petition for a writ of certiorari was filed on February 4, 1999. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

A. Preliminary Statement.

The Government's Petition raises the issue of whether Mr. Martinez-Salazar ("Respondent") should have to demonstrate that he would have exercised a peremptory strike that the district court had erroneously denied him, on another juror. Couched in terms of "prejudice" or "harmless error," the Government's Petition ignores the record which plainly demonstrates that Respondent would have exercised his peremptory strike on another juror, had he not been forced to cure the district court's error. This case does not even raise the issue upon which the Government seeks this Court's review.

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Moreover, the Government raised the argument for the first time in its Petition for Rehearing and Suggestion for Rehearing En Banc before the Court of Appeals. Therefore, the issue has been waived.

In any event, the decision in this case is consistent with this Court's previous holding regarding the erroneous denial of peremptory challenges in criminal trials. Ross v. Oklahoma, 487 U.S. 81, n.4 (1985). In Ross, this Court indicated that a deprivation of peremptory challenges raises the specter of *two* distinct constitutional violations, one involving the sixth-amendment right to a fair and impartial jury and the second involving the fifth-amendment right to procedural due process. Ross, 487 U.S. at n.4. While the Government continues to confuse the important distinction made in Ross, the Ninth Circuit Court of Appeals and all other Circuits have understood it and rationally applied this very important distinction in federal criminal cases.

The federal court precedent, post Ross, holds that the erroneous deprivation of a peremptory challenge, in a federal criminal trial, constitutes a due-process violation, where the defendant exhausts all challenges and uses one to cure the district court's error.[1] The Government's assertions to the contrary reflect, at best, a fundamental misunderstanding of the applicable precedent. Accordingly, the Government's Petition should be denied.

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[1] As set forth below, Respondent's case presented the Court of Appeals with different circumstances, because he demonstrated prejudice to the Court of Appeals by providing unequivocal evidence that he would have exercised the erroneously denied peremptory on another juror. See § B of this Response, infra. The Government's statement of the issue violates this Court's rule requiring it to express the issue "in relation to the circumstances of the case." Rules of the Supreme Court of the United States, R. 14(1)(a) (1998).

B. **Background**.

At the voir dire preceding during Respondent's jury trial, prospective juror Gilbert stated in response to a written question from the court asking whether jurors knew anything that might affect their ability to serve impartially, that "I would favor the prosecution." (Pet. App. 3a). When questioned by the court about this answer, he repeated that "what I'm saying is all things being equal, I would probably tend to favor the prosecution." (Pet. App. 4a). The court then asked whether, "if you were the defendants here charged with this crime, and all of the jurors on your case had your background and opinions, do you think you'd get a fair trial?" Gilbert responded: "[t]hat's a difficult question. I don't think I know the answer to that." Id. Respondent's counsel then questioned Gilbert, asking "If you were to error [sic], where would you feel more comfortable erring, in favor of the prosecution or defendant?" Gilbert responded, "I would probably be more favorable to the prosecution. . . . You assume that people are on trial because they did something wrong." (Pet. App. 5a). When the court mentioned the presumption of innocence, Gilbert answered that he understood that "in theory." Id.

Respondent challenged Gilbert for cause. The Government opposed the challenge, inaccurately stating that "although he [Gilbert] did have some opinions, he did indicate to you that he would follow your instructions and apply them accordingly." (Pet. App. 5a).

Although recognizing that Respondent had "reasons to challenge" Gilbert, the district court denied Respondent's challenge for cause, advising Respondent that he could use a peremptory challenge to strike Juror Gilbert, "if you choose to do that." (Pet. App. 6a). Respondent used a peremptory challenge to strike juror Gilbert, and subsequently exhausted all of his allotted peremptories.

Shortly thereafter, as the petit jury was being called from the jury panel, the parties discovered a potential juror was missing. Id. at 124. Respondent's counsel then twice asked the district court to award an additional peremptory challenge, noting that the additional challenge would allow the parties to go further down the jury list, resulting in more minorities on the panel. (R.T. 12/7/93, pp. 124-25). The district court refused the requests. Id.[2]

In the Court of Appeals, the Government conceded that due process would be violated if Respondent had to use a peremptory challenge to strike a juror who should have been stricken for cause, arguing instead that "the district court had not erred in refusing to strike juror Gilbert for cause." (Pet. App. 9a n.3). The Court of Appeals rejected this argument. The court observed that juror Gilbert "did not and would not affirmatively state that he could lay aside his admitted bias in favor of the prosecution," but rather had "clearly acknowledged this bias." (Pet. App. 8a). The Court of Appeals generously characterized the Government's contrary assertions as being "unsupported by the record." Id. Thus, the district court should have excused juror Gilbert for cause "because of his admitted bias in favor of the prosecution." (Pet. App. 7a).

The Court of Appeals then held, in the circumstances of this case, that Respondent's due process rights had been violated. Respondent "was entitled to use his peremptory challenges

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[2] At the Court of Appeals, the Government affirmatively conceded that if defendant did exhaust all peremptory challenges, including one to cure a trial court error, there was a due process violation. Appellee's Supplemental Brief, p. 12 (6/1/95). The Government first raised the argument (now raised here) that Respondent must show that he would have used the erroneously denied peremptory challenge, on another juror, in its petition for rehearing at the Court of Appeals. The Government acknowledges that, in response to that rehearing petition, Respondent demonstrated that "the trial record indicated that Respondent would have exercised an additional peremptory challenge if one had been available." (Pet. 12 n.6.). The Court of Appeals had this evidence before it when it denied the Government's Petition for Rehearing with the Suggestion for Rehearing En Banc.

solely to strike those jurors who would not otherwise be excused for cause." The district court, however, had erroneously denied Respondent's for-cause challenge to Gilbert, "thereby forcing [Respondent] to exercise one of his peremptories to achieve the same result." Since Respondent ultimately exhausted all of his peremptories, the district court's serious procedural error deprived Respondent of the "full complement" of peremptory challenge he was entitled to exercise under federal law. (Pet. App. 11a-14a).[3]

In reaching this conclusion, the Court of Appeals expressly distinguished prior circuit cases in which the defendant "could suffer not due process violation because he did not exhaust all of his peremptory challenges and hence this right was not 'denied or impaired' in any way." See Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1993). The due process violation occurs "only if the defendant does not receive the full complement of challenges, to which he is entitled by law." In this case, Respondent had "exhausted his eleven peremptories and had to use one of them to strike juror Gilbert" in order to cure "an erroneous for-cause refusal." (Pet. App. 11a-12a). This "erroneous limitation of an essential right of a criminal defendant – the right to exercise non-discriminatory peremptory challenges without judicial interference" required reversal of Respondent's conviction. (Pet. App. 14a-15a). Judge Ryner concurred in part and dissented in part.

The Court of Appeals further found that the error forced Respondent to exercise a peremptory challenge, violating procedural-due process. Martinez-Salazar, 146 F.3d at 656-58. The Court of Appeals expressly noted that Respondent had otherwise exhausted all peremptory

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[3] The court noted that, unlike the law in some jurisdictions, "federal law does not require a defendant to exercise a peremptory in order to cure an erroneous refusal to strike a juror for cause." (Pet. App. 13a and n.6).

challenges. Id. Applying the Ninth Circuit's En Banc decision in United States v. Annigoni, 96 F.3d 1132 (9th Cir. 1996), the Court of Appeals reversed. Maratinez-Salazar, 146 F.3d at 659.

On July 13, 1998, the Government petitioned the Ninth Circuit for rehearing and suggested rehearing En Banc. Despite its earlier concession, the Government now argued that there was no due-process violation, even if the district court erred when it denied Respondent's for-cause challenge. Government's Petition for Rehearing With Suggestion for Rehearing En Banc, pp. 9-10. In support of its new argument, the Government raised yet a new issue, --- namely, that there was no due-process violation, absent a showing that Respondent would have exercised his erroneously denied peremptory challenge, had the district court not erred. Id., at pp. 10-11.

The Court of Appeals ordered Respondent to file what would otherwise have been an optional responding brief. Fed. R. App. P. 35. In that brief, Respondent provided transcript testimony demonstrating that he would have exercised the erroneously denied peremptory strike on another juror. (Pet. 12 n..6); Respondent's Response to Government's Petition for Rehearing with Suggestion for Rehearing En Banc, Appendix A. On October 7, 1998, the Court of Appeals denied the petition for rehearing.

ARGUMENT

The Government challenges the Court of Appeals' Opinion and argues that the Ninth Circuit held that Respondent's procedural due-process rights were denied when the district court erroneously denied a for-cause challenge, forcing the Respondent to exercise a peremptory challenge to cure the trial court's error, where the Defendant had exhausted all other challenges. The Government argues that, absent a showing of prejudice, there cannot be a due-process violation. The

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Government's argument is contrary to the position taken by all the Circuits that have addressed the issue. There is no square conflict.

The Government also dismisses or omits key procedural facts, presented by Respondent to the Court of Appeals, that demonstrate the error was not harmless. The issue raised by the Government, therefore, is not before this Court.

A. Petitioner's Issue is Not Directly Raised by This Case.

Rules of this Court require Respondent to point out any "misstatement made in the Petition" and "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below . . .." See Rules of the Supreme Court of the United States, R. 15(2) (1998). For the following reasons Respondent hereby objects.

1. The Government Ignores the Procedural Posture.

The issue upon which the Government seeks review is simply not before this Court. The Government claims that Respondent "never suggested that he wanted to strike some other juror with the peremptory challenge that was instead used to remove Juror Gilbert." Petition, ¶ 2, p. 5; pp. 11-12.[4] The claim ignores the factual and procedural realities of the case before the Court of Appeals.

Notably, the Government raised this argument for the first time its Petition for Rehearing and Suggestion for Rehearing En Banc filed before the Court of Appeals. The Government raised the issue *after* that Court of Appeals first ruled on the matter. The argument

[4] The Government later acknowledges such evidence was provided to the Court of Appeals but such evidence is to "case specific" and irrelevant. (Pet. 12, n.6). The evidence was relevant precisely because it was case specific. The Court of Appeals ordered a response to the Petition denied it only after it received this evidence.

boldly ignored its earlier concessions at the Court of Appeals and merely parroted Judge Rymer's dissent. Id; Martinez-Salazar, 146 F.3d at 659-61.

Importantly, after the Government raised the issue, the Court of Appeals ordered Respondent to file what would have otherwise been an optional Responding Brief. See Fed. R. App. P. 35(b) (1998). There, the Respondent unequivocally demonstrated that the record in fact reflected that he would have exercised his erroneously denied peremptory challenge on another juror. Indeed, Respondent's counsel twice asked for peremptory challenges when the opportunity presented itself.

It was against this procedural backdrop that the Court of Appeals subsequently denied the Government's Petition for Rehearing and Suggestion for Rehearing En Banc. Surprisingly, the Government's Petition before this Court again ignores these controlling factors and, in fact, dismisses them as "irrelevant." As noted earlier, the Government's position on this point is specious. See note 2, supra

Ultimately, therefore, the Petition misstates the issue as it now stands before this Court. When framed accurately, the issue left before the Court of Appeals, and now this Court, is whether procedural due process is violated when the district court erroneously denies a for-cause challenge forcing the defendant to use a peremptory challenge to cure the error, exhausting all peremptory challenges in the process--- and where there is unequivocal evidence in the record demonstrating that he would have used the erroneously denied peremptory challenge on a different juror.

The Government must await for another case, if it wishes review of the procedurally different issue presented in its Petition.

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2. The Government Waived the Issue.

Even if the issue raised in the Petition were properly framed, the Government waived it by not raising it in a timely manner before the Court of Appeals. See, e.g., Singleton v. Wulff, 428 U.S. 106 (1976); cf. Miller v. Fairchild Indus., Inc., 797 F.2d 727, 737 (9th Cir. 1985) ("The Court of Appeals will not ordinarily consider matters on appeal that are not specifically and distinctly argued in the appellant's opening brief.") (citations omitted). In fact, the Government failed to raise the issue of whether Respondent must demonstrate prejudice for a fifth-amendment violation until it lost the case. If there were any question on the Government's intent to omit the issue, it became clear in the Supplemental Brief and at oral argument when it conceded that if the district court erred, there was a due process violation. Appellee's Supplemental Brief, p. 12; Martinez-Salazar, 146 F.3d at n. 3.

That the Court of Appeals may have "independently" found a due-process violation is of no consequence. While the Government belatedly attempted to retract its earlier concessions, the retraction does not alter the fact that it had already waived the argument by not raising it in the briefs. In short, the Government provides no authority supporting the proposition that it may adopt a new argument, mimicking a dissent, after waiving the issue before the Court of Appeals and after conceding the issue at oral argument.

B. There is No Other Basis for the Petition.

1. Erroneous Denial of a Peremptory Challenge Requires Reversal If it Violates Either the Fifth or the Sixth Amendment.

The Court of Appeals' decision correctly applied this Court's ruling in Ross v. Oklahoma, 487 U.S. 81 (1985) and its own decision in United States v. Annigoni, 96 F.3d 1132 (9th

Cir. 1996). In Ross, this Court addressed a two-prong attack on the Oklahoma state court's erroneous failure to exclude an unqualified juror for cause, forcing the defendant to exercise a peremptory challenge to cure the error. The Court in Ross rejected a sixth-amendment because the unqualified juror had been struck and therefore, the defendant's sixth-amendment right to a fair and impartial jury had not been transgressed. Ross, 487 U.S. at 85-91. The Court also rejected the procedural-due-process challenge because Oklahoma state law required that the defendant cure such errors. Procedurally speaking, Mr. Ross received all that was due him under the law and there was no procedural violation. Id.

This Court in Ross held that violation of the sixth amendment required a showing of a partial or tainted jury,---a violation of the very rights guaranteed by the sixth amendment. This Court expressly limited its holding to the sixth-amendment. Ross, 487 U.S. at n.4. This Court has not addressed the issue since.

The courts of appeals have subsequently addressed the fifth-amendment issue left open in Ross. These courts have uniformly held that, where, as here, the defendant uses a peremptory challenge to cure the district court's erroneous denial of a for-cause challenge and exhausts all other peremptory challenges, a due-process violation occurs and such error is not harmless. See, e.g., Annigoni, 96 F.3d at 1144-1145; United States v. Underwood, 122 F.3d 389, 392 (7th Cir. 1997) ("We join our sister circuits, post Ross, that harmless error is inappropriate where a defendant's peremptory challenge has been denied or impaired") (citing to the Second,

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Third, Fifth and Ninth Circuits.). The First Circuit has come to the same conclusion. See United States v. Cambara, 902 F.2d 144, 147-48 (1st Cir. 1990).[5]

These courts analyses are persuasive. In Annigoni, for example, the district court erroneously granted the Government's Batson challenge,[6] thereby denying defendant a peremptory challenge. Annigoni, 96 F.3d 1144-45. Refusing to apply a harmless error analysis, the Annigoni court found that such error cannot be quantitatively assessed, correctly observing that "to apply a harmless error analysis would be to misapprehend the very nature of peremptory challenges." Id. The court further noted that the courts would have to engage in outright speculation. Id. The other circuits addressing the issue agree that harmless error analysis is entirely inappropriate. See, e.g., United States v. Broussard, 987 F.2d 215, 221 (5th Cir. 1993) (harmless error analysis "would eviscerate the right to exercise peremptory challenges because it would be virtually impossible to determine that [the denial], injurious to the perceived fairness of the petit jury [was] harmless."); accord Kirk v. Raymark, Industries, 61 F.3d 147, 157-59 (3d Cir. 1995), cert. denied, 16 U.S. 1145 (1996).

As noted by the Courts of Appeals, this Court's holding in Swain v. Alabama, 380 U.S. 202 (1965) (and its progeny) leaves no doubt that substantial impairment of peremptory

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[5] The question of whether due-process rights have been impaired in the first instance turns on whether the criminal defendant has "left over" peremptory challenges. Stated another way, the courts first determine whether the district court erroneously denied a for-cause challenge and then require the defendant to have exhausted all other challenges, including one on the constitutionally unacceptable juror. See, e.g., Siriprongs v. Calderon, 35 F.3d 1308, 1405 (9th Cir. 1993); United States v. Baker, 10 F.3d 1374 (9th Cir. 1993) ("the due process 'right' to peremptory challenges is 'denied' or 'impaired' only if the defendant does not receive the full complement of challenges to which he is entitled to under law.").

[6] Batson v. Kentucky, 476 U.S. 79 (1986).

challenges rises to the level of a due-process violation. See, e.g., Annigoni, 96 F.3d at 1143-46; Underwood, 122 F.3d at 391. In Swain, this Court addressed a defendant's attack of an all-white jury on the ground that he had been denied equal protection under a racially discriminatory selection process, including the misuse of peremptory strikes. Notwithstanding the statutory nature of peremptory challenges, this Court observed:

> The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenges is a necessary part of a trial by jury. []. [T]here is nothing in the Constitution of the United States which requires the Congress grant peremptory challenges []. Nonetheless the challenges are 'one of the most important of the rights secured to the accused."[] The denial of impairment of the right is reversible error without a showing of prejudice. []. "For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose."[]

Swain, U.S. at 218-19 (citations omitted).

The Courts of Appeals decision also observed that Ross did not retreat from the strong position taken in Swain. See, e.g., Annigoni, 96 F.3d at 1146. This Court merely acknowledged the principle that peremptory challenges are a procedural creature created by statute and that when the legislative authority limits its exercise, there is no procedural due process violation ---- because the defendant receives all the procedure that is statutorily due. Ross, 487 at n.4.

In Ross, this Court further noted that in state courts, state procedural law governs the application of peremptory challenges. Ross, 487 U.S. 89-91 (citing Ferril v. State, 475 P.2d 825 (Okla. Crim. App. 1970); McDonald v. State, 15 P.2d 1092 (Okla. 1932)). The use of peremptory challenges under Fed. R. Crim. P. Rule 24, on the other hand, is a matter of Federal law and does not require the defendant to cure trial court errors. See, e.g., United States v. Beasley, 489 F.3d 268,

n.5 (7th Cir. 1995); United States v. Boyd, 446 F.2d 1267, 1276, n. 27 (5th Cir. 1971).

There are no "square conflicts," as claimed in the Government's Petition. Indeed, the Government cites to no Circuit that has squarely held that denial of peremptory challenges requires a harmless-error analysis. In each case cited by the Government as being in conflict with the Ninth Circuit, the court addressed a *sixth-amendment* violation, found no error in striking the juror, or failed altogether to address whether a due-process violation occurred at all. See United States v. Gibson, 105 F.3d 1229, 1233 (8th Cir. 1997) (no discussion of due process); United States v. McIntyre, 997 F.2d 687, n. 7 (10th Cir. 1993) (court rejected claim that juror should have been struck and, in any event, ruled on sixth-amendment grounds only); Getter v. Wal-Mart Stores, Inc., 66 F.3d 1119 (10th Cir. 1995) (court found no *seventh* amendment violation, analogizing only to Ross' sixth-amendment analysis only); United States v. Farmer, 923 F.3d 1557, 1566 & n.18 & 20 (11th Cir. 1991) (court expressly noted that the district court gave five more peremptory challenges than defendant was entitled to).

Similarly, there are no "internally inconsistent" circuits. Petition, p. 17, n. 9. The Government again cites cases where the courts failed to address any due-process claim or found that the district court did not error in striking the disputed juror in the first instance. See United States v. Rubin, 37 F.3d 49, 54 (2d Cir. 1994) (no error in striking juror and the court and never addressed whether it considered the "claim" a potential sixth or fifth-amendment violation); United States v. Love, 134 F.3d 595 (4th Cir.), cert. denied, 118 S. Ct. 2332 (1998) ("It cannot be said that the defendants 'wasted' their peremptory challenges" rejecting claims of confusion over process used by the district court) (distinguishing itself on those grounds from its En Banc decision in United States v. Ricks, 802 F.3d 731 (4th Cir. 1986)).

2. The Error was Not Harmless.

Despite the circuit courts' clear rejection of a harmless-error analysis, the Government now asks the Court to apply this analysis because the defendant purportedly never proffered evidence that he would have exercised the erroneously-denied challenge to another juror. Petition, pp. 11-12. Even if such harmlessness could be measured in these terms, the argument is both legally and factually incorrect.

The Government's argument is legally incorrect because it ignores the distinction between sixth and fifth-amendment violations. A sixth-amendment violation occurs only upon the transgression of rights to a fair and impartial jury. See Ross. A fifth-amendment, procedural due process violation occurs upon the substantial impairment of the procedural rights owed under law. See, e.g., Baker.

Here, Respondent's procedural rights included the right to exercise his peremptory challenges freely without judicial interference. Swain. The Government's argument that he should have asked for another strike is bewildering. Respondent had already moved to strike Juror Gilbert for cause, and the district court was on clear notice that the defendant found him constitutionally objectionable. Moreover, responding to the motion to strike Juror Gilbert for cause, the district court expressly suggested that the defense use a peremptory challenge to strike him. (R.T. 12/7/93, p. 103). To suggest that the defense should then ask for an additional peremptory strike is to require the asking for something that had been just expressly denied. The argument is nonsensical.

Moreover, there is direct evidence that Respondent would have exercised the erroneously denied strike on another juror. Indeed, his counsel expressed a desire for additional peremptory strikes. When the opportunity arose, he twice requested for an additional peremptory

strike. These requests for additional peremptory challenges, in conjunction with the exhaustion of all previous strikes, clearly indicate that Respondent would have exercised his erroneously denied peremptory strike on another juror.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted: March 18, 1999.

FREDRIC F. KAY
Federal Public Defender

Michael D. Gordon

MICHAEL D. GORDON
Assistant Federal Public Defender

CERTIFICATE OF MAILING - PROOF OF SERVICE

Michael D. Gordon, Assistant Federal Public Defender, District of Arizona, Phoenix, Arizona declares under penalty of perjury that the following is true and correct:

That in accordance with Rule 29(2)Supreme Court Rules, he has properly deposited in a United States Post Office or mailbox this original Response to Petition For Writ Of Certiorari to be forwarded to the Clerk of the Supreme Court of the United States of America within the period prescribed in Rule 13.1, Supreme Court Rules.

That in accordance with Rule 29(5), Supreme Court Rules, on 18th day of March 1999, one copy of this Response to Petition For Writ Of Certiorari has been mailed to the Honorable Seth Waxman, Solicitor General, U.S. Department of Justice, 10th Street and Constitution Ave., N.W., Room 5143, Washington D.C. 20530; one copy hand-delivered to Vincent Kirby, Assistant U.S. Attorney, 4000 United States Courthouse, Phoenix, Arizona, telephone number (602) 514-7500; and one copy mailed to, Respondent Abel Martinez-Salazar.

FREDRIC F. KAY
Federal Public Defender

Michael D. Gordon

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